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Toward Getting Beyond the Blame Game: A Critique of the Ideology of Voluntarism in Title VII Jurisprudence

Sandi Farrell
Americans United for Separation of Church and State,

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BY SANDI FARRELL*

INTRODUCTION

Despite its relative invisibility, the ideology of voluntarism has played a critical role in Title VII[1] jurisprudence. In context after context, the rhetoric of choice and volition has been invoked to deny individuals with otherwise cognizable claims, relief for the discrimination experienced in an employment setting. Yet sociology suggests that human behavior is patterned and not reducible to the decisions of individuals. Moreover, it is not at all clear that individuals possess the kind of free will that they are held responsible for exercising or that whatever amount of free choice individuals do possess is possessed equally by all, at least with respect to the particular choices at issue in employment discrimination cases. Thus, the use of voluntarist ideology in Title VII jurisprudence is deeply problematic and deserves to be exposed and rethought.

Part I of this Article examines the concept of voluntarism, briefly discussing its philosophical and historical foundations in Western culture that have made it such a widely and uncritically accepted explanation for human behavior.[2] Part II maps some of the Title VII contexts in which voluntarism has been a critical factor in shaping the direction and success of litigation.[3] These include sex/gender contexts including dress and

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* Madison Fellow, Americans United for Separation of Church and State, 2003-2005. J.D. 2001, Yale Law School; B.A. 1998, Louisiana State University. The author wishes to thank Professor Vickie Schultz for her assistance and encouragement in writing this Article, and for inspiring the ideas herein by touching upon voluntarism on several occasions in her Fall 1999 Employment Discrimination course at the Yale Law School. The author would also like to thank Professor Kenji Yoshino, without whose guidance, support, and valuable suggestions this Article could not have been completed.

[1] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000 (2003).

[2] *See* discussion *infra* Part I.

[3] *See* discussion *infra* Part II.

grooming standards, sexual orientation and transsexualism, and sexual harassment; race and national origin contexts including dress and grooming standards, arrest and conviction records, and language; and in the religion contexts, accommodating employees' exercise of religion, particularly religious holidays.

Part III will attempt to answer the question, "Why voluntarism?"[4] This Part looks briefly at the relevance of equal protection jurisprudence, after which Title VII was modeled.[5] Equal protection jurisprudence is deeply flawed in its extension of protection to some groups and not others on the basis of whether characteristics are perceived as voluntarily chosen or biologically or socially assigned at birth. Other possible explanatory factors are the dominance of Christianity in American law and society, including the Christian idea of free will and the American ideology of merit (i.e., believing that one's good fortune is the product of her actions, choices, or intrinsic worth).[6] Finally, the role of economics has played a part in the law's decision to favor employer prerogatives over the meritorious discrimination claim of the nonconforming employee.[7] The Article then evaluates whether these factors signify a lack of understanding of the complexities of human behavior or simply a lack of commitment to the anti-subordination project and an unswerving allegiance to the status (hierarchy) quo.[8]

Part IV of the Article argues that the goals of Title VII, properly understood, are frustrated by the use of voluntarism ideology in deciding which plaintiffs merit relief under the statute.[9] The use of such rhetoric has helped to gut Title VII, rendering it close to impossible for a plaintiff to win a case under a statute that was designed to bring about equality of employment opportunities. It indicates that we live in a world in which it is easy to blame people for their own misfortunes or adverse circumstances, and it is difficult to see the world as more complex than such an attitude allows, to understand that individuals can neither be said to be entirely responsible for their own fates nor entirely free from responsibility for them. Under this analysis, it is crucial to recognize that where an individual's free will ends and the social, cultural, and environmental factors acting upon him or her begins is an impossible and ultimately unproductive

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[4] *See* discussion *infra* Part III.

[5] *See* discussion *infra* Part III.A.

[6] *See* discussion *infra* Part III.B.

[7] *See* discussion *infra* Part III.C–D.

[8] *See* discussion *infra* Part III.E.

[9] *See* discussion *infra* Part IV.

inquiry. Moreover, voluntarism is not the actual principle upon which cases are decided, but merely a vehicle for expressing (or perhaps concealing) the true basis for judicial decisions. For these reasons, it should be abandoned as a means of substantiating decisions in Title VII cases.

I. WHAT IS VOLUNTARISM?

The concept of "voluntarism" is perhaps better characterized as a family of scholarly dialogues that is known by many names and has several members. Among them are "free will," "agency," "determinism," and "moral responsibility." While there are philosophical distinctions between the members of the family, this Article characterizes them as a cluster of closely related ideas. The different labels represent the long history of debate among academics in many disciplines as to whether human beings are primarily active subjects that determine the courses of their own lives, or whether they are primarily objects acted upon by social, cultural, biological, or environmental forces beyond their control, and, in part based upon the answer to this question, what responsibility they bear for their actions—morally and legally. While there is no need to recapitulate that debate here, this Article will sketch some of its broad outlines and offer a few examples showing how the law, specifically the law of Title VII, has taken a definite position in this debate—the wrong one in my view.

The problem of free will has occupied the minds and energies of philosophers and theologians for many centuries. Professor Robert Kane defines free will as "the power of agents to be the ultimate creators (or originators) and sustainers of their own ends or purposes."[10] While there are many definitions of free will in the vast literature on the subject, this characterization works as well as any for these purposes.[11] Free will is an ancient idea that has been under attack, especially since the seventeenth century, by successive waves of determinist thought, which posit that "all of our purposes and actions are determined or necessitated by factors beyond the control of our wills."[12] Such determinisms include the ancient

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[10] ROBERT KANE, THE SIGNIFICANCE OF FREE WILL 4 (1996).

[11] For example, there is a contemporary trend toward differentiating between the concept of "free will" and "free action" as some philosophers have dismissed the idea of the will as a fiction. *See id.* at 3–4. This distinction, and others like it, is too refined for the objectives to be accomplished here. The reader should be aware, however, that this brief account of the concept of voluntarism does not even touch upon many of the themes covered in the philosophical literature on the subject.

[12] *Id.* at 5.

idea of fate, the notion of universal laws of nature (scientific determinism), the idea that our actions are the products of birth and upbringing (psychological determinism), theological determinism, and the laws of logic.[13] The notion that human beings possess free will has been refuted, especially in the twentieth century, because of its incompatibility with the image of human beings generated by the social and natural sciences.[14]

Moral responsibility is a related but distinct concept that takes the free will/determinism debate one step further, asking why and when human beings should be held responsible or blameworthy for their actions or character traits.[15] This inquiry is often conflated with the free will/determinism discussion, because those who posit that human behavior is the result of free choices of individual human subjects frequently use this contention to support assignments of moral responsibility to individuals in a variety of factual contexts. As a general matter, one who examines moral responsibility asks who may be held morally blameworthy and why, and then asks whether the morally blameworthy may also be held socially and/or legally responsible for their actions.

Notions of responsibility, then, are integrally related to the free will/determinism discussion. In fact, one can argue that "according to our modern concept of moral responsibility, free will is no longer a mere condition of moral responsibility but its very source."[16] Other commentators suggest that the relationship between free will and moral responsibility need not be so linear; in other words, even if some version or versions of determinism is true, it does not necessarily mean that the social and legal practices associated with moral responsibility must be abandoned.[17] But, society must be aware of the fact that its notions of free will and its judgments about responsibility are based upon "practical considerations which are . . . themselves mediated by our own social and political norms."[18]

Clearly, the concept of free will and its relationship to the practice of assigning moral/social/legal blame are issues with which the law is, and

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[13] *Id.* at 5–8.

[14] *Id.* at 5.

[15] *See generally* PERSPECTIVES ON MORAL RESPONSIBILITY (John Martin Fischer & Mark Ravizza eds., 1993) (collecting essays regarding issues of responsibility); MARION SMILEY, MORAL RESPONSIBILITY AND THE BOUNDARIES OF COMMUNITY (1992) (examining judgments in blame-based cases, in part, on an individual's social and political points of view).

[16] SMILEY, *supra* note 15, at 82.

[17] *See* Susan Wolf, *The Importance of Free Will*, *in* PERSPECTIVES ON MORAL RESPONSIBILITY, *supra* note 15, at 101.

[18] SMILEY, *supra* note 15, at 121.

should be, concerned. The law, however, needs to be aware of competing visions of the causes of human behavior and explicitly weigh the merits and relevance thereof, rather than blindly incorporating social and political norms. The dominant view on free will in our society (outside the academy, at least) is fully accepting of the following analysis: individuals possess free will; thus, their characters and behaviors in the vast majority of instances are the result of the exercise of that agency; thus, individuals should be held accountable for any harms that result from their actions.

This chain of reasoning is implicit in many areas of the law, which is most often concerned with assigning blame and penalizing the blameworthy accordingly. For example, one object of criminal law is to identify and punish those who have violated laws with criminal penalties. Similarly, the purpose of tort law is to hold financially responsible those who have in some sense "caused" harm to others. To a large extent, these legal regimes are premised upon notions of human agency and free choice—which hold that the harms caused by the tortfeasor or criminal may fairly be traced back to the free actions of that individual—and thus that the societal costs of the harm may justly be visited upon her, whether by taking her money or her freedom. In other words, much of our legal system is grounded in what this Article refers to as the ideology of voluntarism.

The law often unthinkingly imports voluntarism—the dominant analysis of agency and responsibility in our culture—into employment discrimination law.[19] While notions of individual responsibility and blameworthiness that comprise voluntarist rhetoric might be appropriate in tort law and criminal law, they do not translate easily into anti-discrimination law discourse. In an anti-discrimination law context, the utilization of such ideas serves only to stymie the realization of the purposes of the law rather than to facilitate it. In the next section, this Article looks at Title VII cases where voluntarist ideas were detrimental to the claims of plaintiffs who otherwise might have obtained relief.

II. MAPPING THE TITLE VII CONTEXTS IN WHICH VOLUNTARISM IS A CRITICAL FACTOR[20]

Previous commentators have addressed the distinction courts have made in Title VII law between immutable and mutable traits, or status and

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[19] Of course, it is probably the case that this kind of thinking permeates most or all areas of law, in part because it is so constitutive of some.

[20] Intentionally, most of the cases that I cite in this section are well known—many of them may be found in any employment discrimination textbook—and have

conduct, to which it is sometimes referred.[21] This Article's analysis, however, both draws from and builds on those works. For example, Professor Peter Bayer concentrates on Title VII's negative assimilationist bias in discussing the way in which courts have made a distinction between immutable and mutable traits.[22] His argument against making that distinction is to "protect[ ] the selfhood, personal integrity, and individual sensibilities of employees."[23] This Article takes this argument further by positing that Title VII should be interpreted not simply to protect the liberty

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already been subject to extensive academic commentary. I decided to use well-known examples for a few reasons. First, because they have been so influential, their impact on the shape of Title VII jurisprudence is undisputed; using a few unknown cases from lower courts, on the other hand, might have called into question the pervasiveness of the phenomenon I seek to illustrate. Second, I hope familiarity with the cases will facilitate the ease with which the reader may make the same connections I have made between the cases. Also, many of the cases I cite are old, but this is because many of these areas of doctrine are so settled that cases challenging them are no longer brought.

[21] *See* Peter Brandon Bayer, *Mutable Characteristics and the Definition of Discrimination Under Title VII*, 20 U.C. DAVIS L. REV. 769 (1987) (discussing the race and sex dress code cases as examples of mutable characteristics related to those statuses that courts have nonetheless refused to protect); Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317 (1997). Engle discusses the racial appearance cases, the sex-based dress and grooming cases, and the religious accommodation cases together to show that outcomes and reasoning in the cases are substantially similar. She also discusses that the religious accommodation provision is not well suited to serve as a model for Title VII reform, and acknowledges that the status-conduct distinction is firmly entrenched in Title VII jurisprudence. *Id.* at 326.

[22] *See* Bayer, *supra* note 21. Professor Kenji Yoshino makes a related claim about equal protection jurisprudence. *See* Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell"*, 108 YALE L.J. 485 (1998). Yoshino contends that equal protection jurisprudence has an "assimilationist bias," meaning that because the law currently privileges classifications that are presumed to be visible and immutable, groups which might also merit heightened scrutiny, but whose defining characteristics can be changed or concealed, are encouraged to assimilate by doing so. *Id.* at 490. Yoshino's point is that it is illegitimate for the government to demand that individuals assimilate in order to be protected from discrimination. *Id.* My argument is that even if it *were* legitimate to encourage assimilation in this way, I dispute the assumption that assimilation is a matter of meaningful choice as I define it.

[23] Bayer, *supra* note 21, at 881.

of the individual employee but to allow workers, whose different life experiences have to some extent *determined* their normative differences, to enjoy equal employment opportunities. To make the claim that individual liberty is the crucial factor here assumes that such liberty meaningfully exists; this Article will argue that the agency of the individual worker is far more constrained than the courts presume.

Similarly, Professor Karen Engle eloquently critiques the distinction the courts have made between status and "volitional" conduct in the workplace appearance cases, the language cases, and the religious accommodation cases.[24] The purpose of her article is to assess critically the preoccupation of the courts with interpreting Title VII to mandate what they perceive as neutrality.[25] In so doing, she mentions that other scholars have argued that the status-conduct distinction is flawed because "some traits which seem mutable are either immutable or are not purely mutable."[26] But neither she nor any of the critics she cites ever fully engages the question of what it might mean for a trait to be not purely mutable or why the courts might have chosen this particular vehicle for justifying their decisions.

Finally, this Article's analysis goes beyond existing commentary on this subject because it covers a broader range of Title VII contexts than has been previously examined. Currently, no commentator has considered the possible relevance of this inquiry to cases in which defendants raise the lack of interest argument, sexual harassment cases, or cases involving arrest

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[24] *See* Engle, *supra* note 21.

[25] Engle argues that in race cases, the courts take an "integrationist" approach (no different treatment), whereas in sex cases they take a "separationist" approach (disparate treatment allowed as long as it equally burdens both sexes). *Id.* at 327–55. The main objective of Engle's article is to answer commentators who have suggested that the approach to race and sex in Title VII cases should be more like the approach to religion (i.e., accommodation). Engle studies the religion cases and reveals that despite the religious accommodation provision in Title VII, courts have been unable to move beyond integrationist and separationist (or, what they perceive as "neutral") frameworks. *Id.* at 406–08.

[26] *Id.* at 354 (citing BILL PIATT, LANGUAGE ON THE JOB: BALANCING BUSINESS NEEDS AND EMPLOYEE RIGHTS 121 (1993)) (arguing that acquiring one's native language entails immutable neurophysiological changes); *see also* Paulette Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 383 ("[H]air has both mutable and immutable characteristics."); Michael F. Patterson, Note, Garcia v. Spun Steak Company: *English-Only Rules in the Workplace*, 27 ARIZ. ST. L.J. 277, 293 (1995) (arguing that language is "practically immutable")).

and conviction records. Some commentators have examined one context, such as English-only policies, in isolation, and have come to somewhat similar conclusions about that particular context.[27] Still, this Article does not comprehensively cover every Title VII context in which voluntarist rhetoric has been employed. Rather, it seeks to heighten awareness about the use of such rhetoric across many different Title VII contexts.

A. Sex/Gender

1. *The Lack of Interest Argument*

It seems beyond dispute that job segregation on the basis of race and sex was the principal phenomenon that Title VII was intended to ameliorate.[28] Unfortunately, at the dawn of the twenty-first century, a majority of Americans still labor in workplaces segregated by race, sex, or both. Part of the explanation for Title VII's failure to desegregate work in the United States is that suits brought under the statute, challenging job segregation, have often been decided in favor of employers, who claim that individual workers are responsible for segregated workforces instead of themselves.[29]

Professor Vicki Schultz has documented compellingly the force and prevalence of the so-called "lack of interest" argument—the contention that employers bear no responsibility for sex or race segregation in the workplace because women or persons of color were not interested in applying for the (usually more highly rewarded) jobs in which they are underrepresented or absent—in Title VII cases.[30] Of the sex-discrimination

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[27] On language discrimination, see, for example, Stephen M. Cutler, Note, *A Trait-Based Approach to National Origin Claims Under Title VII*, 94 YALE L.J. 1164 (1985); Steven I. Locke, *Language Discrimination and English-Only Rules in the Workplace: The Case for Legislative Amendment of Title VII*, 27 TEX. TECH L. REV. 33 (1996); Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805 (1994) On dress and grooming in the context of sex, see *infra* note 37. On dress and grooming in the context of race, see Caldwell, *supra* note 26.

[28] *See* Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073, 1074–75 (1992).

[29] *See, e.g.*, EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988).

[30] *See* Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation In the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990); *see also* Schultz & Petterson, *supra* note 28.

cases Schultz documents, the most well-known is *EEOC v. Sears, Roebuck & Co.*, in which the EEOC argued that Sears had discriminated against women in its hiring practices for commission sales jobs, which were filled overwhelmingly by men, relegating women to lower-paying noncommission sales positions.[31] The court accepted Sears' argument that the striking disparities in the percentage of women applicants for sales positions generally and the percentage of women in commission sales jobs[32] resulted from women's own, pre-existing employment preferences, not from discrimination.[33] In so doing, the court countenanced explanations for women's alleged lack of interest in commission sales jobs that were premised upon stereotypes about women workers' supposed aversion to competition and risk and their preference for a "softer," more nurturing working environment.[34]

Sears is just one example of a sex discrimination case in which a court has accepted the lack of interest argument; it was neither a new nor isolated phenomenon in 1986 when the case was decided.[35] In fact, Schultz and Petterson's data shows that between 1967 and 1989, defendants who asserted the lack of interest defense in sex discrimination cases prevailed over forty percent of the time.[36] The ascription of workplace sex segregation to women's lack of interest in more highly-paid work represents a particularly pernicious version of voluntarist ideology.

2. *Workplace Appearance*

Another context in which notions of personal choice have figured into Title VII judicial decision-making is that of employer dress and grooming codes that discriminate on the basis of sex.[37] Many of these cases have been

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[31] *Sears*, 628 F. Supp. at 1278.

[32] According to statistics compiled by the EEOC, women represented sixty-one percent of applicants for full-time sales positions from 1973 to 1980 but made up only twenty-seven percent of commission salespersons, whereas seventy-five percent of noncommission sales jobs in the same period went to women. Schultz, *supra* note 30, at 1752 (quoting Brief for the Equal Employment Opportunity Commission as Appellant at 7, EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988) (Nos. 86-1519 and 86-1621)).

[33] *Sears*, 628 F. Supp. at 1315.

[34] *Id.* at 1307.

[35] *See* Schultz, *supra* note 30, at 1776–99.

[36] Schultz & Petterson, *supra* note 28, at 1097.

[37] I am far from the first person to discuss the cases cited in this Article and to criticize their outcomes. *See, e.g.*, Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms, and Workplace Equality*,

brought by men with long hair challenging employer grooming policies requiring men, but not women, to keep their hair short.[38] Perhaps the most-cited of these is *Willingham v. Macon Telegraph Publishing Co.*, in which the Fifth Circuit found that such a policy did not violate Title VII's prohibition of sex discrimination.[39] Because these policies facially treat men and women differently, judges in these early cases had to be creative to find that differential hair-length policies did not fall within Title VII's purview. The hair length cases were brought using the so-called "sex-plus" theory, in which the employee is discriminated against on the basis of her sex plus some purportedly neutral characteristic. Conveniently enough for the Fifth Circuit in *Willingham*, the two leading cases of sex-plus discrimination at the time concerned employer policies prohibiting female employees being married[40] and having young children.[41] So the court created out of whole cloth the following interpretation of the sex-plus doctrine, eliminating most employer liability for sex discrimination on the basis of disparate dress and grooming policies:

> [A] line must be drawn between distinctions grounded on such fundamental rights as the right to have children or to marry and those interfering with the manner in which an employer exercises his [sic] judgment as to the way to operate a business. Hair length is not immutable and in the situation of employer vis-à-vis employee enjoys no constitutional

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92 MICH. L. REV. 2541 (1994); Bayer, *supra* note 21, at 841–80; Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1, 60–69 (1995); Engle, *supra* note 21, at 340–53; Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 75–80 (1995); Karl E. Klare, *Power/Dressing: Regulation of Employee Appearance*, 26 NEW ENG. L. REV. 1395 (1992).

[38] *See, e.g.*, Barker v. Taft Broad. Co., 549 F.2d 400 (6th Cir. 1977); Earwood v. Cont'l S.E. Lines, Inc., 539 F.2d 1349 (4th Cir. 1976); Longo v. Carlisle DeCoppet & Co., 537 F.2d 685 (2d Cir. 1976); Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249 (8th Cir. 1975); Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084 (5th Cir. 1975); Baker v. Cal. Land Title Co., 507 F.2d 895 (9th Cir. 1974); Dodge v. Giant Foods, Inc., 488 F.2d 1333 (D.C. Cir. 1973).

[39] *See Willingham*, 507 F.2d at 1084.

[40] *See* Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971) (invalidating airline policy requiring female flight attendants to remain unmarried).

[41] *See* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (holding that disparate treatment with respect to a subclass of one sex can violate Title VII in the context of an employer policy of refusing to hire female employees who had small children).

> protection. If the employee objects to the grooming code, he [sic] has the right to reject it by looking elsewhere for employment, or alternatively, he [sic] may choose to subordinate his [sic] preference by accepting the code along with the job.
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> We adopt the view, therefore, that distinctions in employment practices between men and women on the basis of something other than immutable or protected characteristics do not inhibit employment opportunities in violation of [Title VII].[42]

Clearly, voluntarist ideas animated the *Willingham* court's reasoning. Two main justifications are being offered here, consistent with the reasoning offered in other "haircut" cases. First, the courts reason that Congress' intent was to afford equal employment opportunities for women relative to those available to men.[43] They cannot seem to conceive of any way in which protecting male employees with long hair could possibly effectuate that goal. Second, the policies complained of are trivialized by the courts as having a de minimis effect on the plaintiffs precisely because hair length is not an immutable characteristic.[44] From the courts' perspective, it is a minimal intrusion upon the employee's personal autonomy to get a simple haircut (the implicit premise being that men should have short hair anyway). Further, the courts perceive the plaintiffs' employment with the companies whose policies are complained of as itself a product of their own choices.[45] The courts imply that if a man wants to wear his hair long, he can simply find another job. If he chooses to work for a company, that choice implies, or indeed demands, his compliance with the company's dress code.

The early decisions of the appellate courts in the "haircut" cases have been followed in other dress and grooming code cases, such that, with very few exceptions, an employer may impose different standards upon men and women workers without risking any Title VII liability.[46] Cases have

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[42] *Willingham*, 507 F.2d at 1091–92.

[43] *See id.* at 1091; *see also* Austin v. Wal-Mart Stores, Inc., 20 F. Supp. 2d 1254, 1256 (N.D. Ind. 1998).

[44] *See* Bayer, *supra* note 21, at 853–60 (arguing that modes of dress are integral to an individual's sense of identity).

[45] *See, e.g.*, *Willingham*, 507 F.2d at 1091; Fagan v. Nat'l Cash Register Co., 481 F.2d 1115, 1124 (D.C. Cir. 1973).

[46] There are two notable exceptions to this rule. First, some courts have ruled that requiring women but not men to wear uniforms violates Title VII. *See, e.g.*, O'Donnell v. Burlington Coat Factory Warehouse, 656 F. Supp. 263, 266–67 (S.D. Ohio 1987) (holding that requiring female but not male sales clerks to wear a

involved policies such as requiring men, but not women, to wear a tie[47] and requiring women to wear makeup.[48] In many of the cases, courts have found against the plaintiffs and have often downplayed the seriousness of the claims by characterizing them as trivial and unrelated to equal employment opportunity.

For example, in *Lanigan v. Bartlett & Co. Grain*, the district court held that a company policy prohibiting women from wearing slacks to work did not violate Title VII, relying on the "haircut" cases to support its decision.[49] In response to the plaintiff's argument that the haircut cases were distinguishable and that her claim fell within the sex-plus doctrine, the court identified three kinds of characteristics that may give rise to a valid sex-plus claim: "(1) immutable characteristics, (2) characteristics which are changeable but which involve fundamental rights (such as having children or getting married), and (3) characteristics which are changeable but which significantly affect employment opportunities afforded to one sex."[50] Dripping with disdain, the court rejected Lanigan's sex-plus claim:

> Plaintiff does not contend that she is unable to wear clothes other than pantsuits or that she is in any way physically unable to comply with the dress code. In other words, [her] affection for pantsuits is not an "immutable characteristic." Plaintiff does not contend that she has a "fundamental right" to wear pantsuits to work. Plaintiff does contend that

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smock perpetuated sex stereotypes in violation of Title VII); Carroll v. Talman Fed. Sav. & Loan Ass'n, 604 F.2d 1028, 1033 (7th Cir. 1979) (holding that employer dress policy that required female employees to wear color-coordinated skirts or slacks and a jacket, tunic, or vest, where male employees were only directed to wear proper business attire, violated Title VII). Second, in some cases, requiring only women to wear sexually provocative attire has been held to discriminate on the basis of sex. *See, e.g.*, EEOC v. Sage Realty Corp., 507 F. Supp. 599, 611 (S.D.N.Y. 1981) (holding that revealing lobby attendant uniforms violate Title VII); Marentette v. Mich. Host, Inc., 506 F. Supp. 909, 912 (E.D. Mich. 1980) (holding that sexually provocative waitress uniforms may violate Title VII).

[47] *See* Fountain v. Safeway Stores, Inc., 555 F.2d 753 (9th Cir. 1977).

[48] *See, e.g.*, Tamimi v. Howard Johnson Co., Inc., 807 F.2d 1550 (11th Cir. 1987) (holding that female employee allegedly fired for refusing to wear makeup was discriminated against on the basis of sex, but only because the makeup policy was created as a pretext to terminate her in relation to skin problems associated with pregnancy, and refusing to rule on the question of whether the make-up policy itself violated Title VII).

[49] Lanigan v. Bartlett & Co. Grain, 466 F. Supp. 1388, 1392 (W.D. Mo. 1979).

[50] *Id.* at 1391.

> the dress code significantly affects employment opportunities because it perpetuates "a sexist, chauvinistic attitude in employment."
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> . . . The decision to project a certain image as one aspect of a company policy is the employer's prerogative which employees may accept or reject. If they choose to reject the policy, they are subject to such sanctions as deemed appropriate by the company. An employer is simply not required to account for personal preferences with respect to dress and grooming standards. In this case, plaintiff has not demonstrated how defendant's dress code policies impermissibly restrict equal employment opportunities and her contention that the policies perpetuate a stereotype is simply a matter of opinion.[51]

Once again, voluntarist rhetoric is at work here. The *Lanigan* court conceptualized the claim of the female employee fired for wearing pantsuits to work as concerning the exercise of individual fashion preferences and choices rather than acknowledging the real issue: the enforced differentiation between men and women workers that reinforces the image of men as ideal, competent workers and the image of women as inauthentic, inferior workers.

3. *Transsexualism*

Another claim of sex discrimination that courts have rejected due to voluntarist beliefs is that of the transsexual. In *Holloway v. Arthur Andersen & Co.*, the Ninth Circuit rejected plaintiff Ramona (formerly Robert) Holloway's sex discrimination claim using some of the same reasoning articulated in the dress code cases.[52] In particular, the court reasoned that Title VII was intended to remedy the lack of equal employment opportunities afforded to women,[53] and because transsexualism is not an immutable trait, but a choice made by an individual, Title VII is not applicable.[54] The court asserted that "Holloway has not claimed to have [been] treated discriminatorily because she is male or female, but rather

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[51] *Id.* at 1391–92.

[52] *See* Holloway v. Arthur Andersen & Co., 566 F.2d 659, 664 (9th Cir. 1977).

[53] *See id.* at 662 ("[T]he clear intent of the 1972 legislation was to remedy the economic deprivation of women as a class. The cases interpreting Title VII sex discrimination provisions agree that they were intended to place women on an equal footing with men.").

[54] *Id.* at 664.

because she is a transsexual who chose to change her sex . . . . A transsexual individual's decision to undergo sex change surgery does not bring that individual, nor transsexuals as a class, within the scope of Title VII."[55] Under this analysis, even if transsexualism is itself an immutable characteristic (a possibility that the *Holloway* court seemed to reject), it is the *choice* of the transsexual individual to undergo the sex-conversion process, which is the key reason that the employer may not be held liable.

Similarly, in *Ulane v. Eastern Airlines, Inc.*, the Seventh Circuit emphasized that Ulane, a male-to-female transsexual, was not discriminated against as a woman, but as a transsexual—"a biological male who takes female hormones, cross-dresses, and has surgically altered parts of her body to make it appear to be female."[56] The court clearly did not accept the contention that transsexualism is an authentic disorder, describing it as "discontent with the sex into which [one was] born."[57] This viewpoint surely had an impact upon its decision. The corollary to this disbelief in the authenticity of transsexualism, however, is the unquestioning acceptance of the idea that plaintiffs, like Ulane and Holloway, exercise a free choice to alter their bodies in a way that their employers find unacceptable, and when they exercise that choice, they should be prepared to accept the consequences.[58]

4. *Sexual Orientation*

In *DeSantis v. Pacific Telephone & Telegraph Co.*, the Ninth Circuit held that homosexuality did not fall under the Title VII prohibition on sex

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[55] *Id.*

[56] Ulane v. E. Airlines, Inc., 742 F.2d 1081, 1087 (7th Cir. 1984).

[57] *See id.* at 1085.

[58] A related argument may be seen in the more recent case of *Oiler v. Winn-Dixie Louisiana, Inc.*, No. CIV.A.00-3114, 2002 WL 31098541 (E.D. La. Sept. 16, 2002), in which the court held that the plaintiff, a self-identified heterosexual who was terminated for cross-dressing during non-working hours, did not state a cognizable Title VII claim for sex discrimination under the sex-stereotyping theory. He was terminated because he "wears women's clothing, shoes, underwear, breast prostheses, wigs, make-up, and nail polish, pretends to be a woman, and publicly identifies himself as a woman named 'Donna.'" *Id.* at *5. Notably, the court cited both *Holloway* and *Ulane* in its opinion. The implication of the court's rationale for its holding is that if Oiler had simply possessed effeminate traits that he possibly could not control, he might have been protected by Title VII from discrimination, but because he chose to act upon his compulsion to cross-dress, he was excluded from Title VII's protection. *See id.*

discrimination.[59] The court stated that sex discrimination applies only to discrimination on the basis of gender, and "should not be judicially extended to include sexual preference such as homosexuality."[60] The phrase "sexual preference" itself reveals a reliance upon voluntarist principles; thus, it has been rejected in recent years in favor of the phrase "sexual orientation," implying that the individual does not freely choose the sex of the person to which she is attracted. There are no other direct references in the *DeSantis* opinion to an understanding of "homosexuality" as a voluntary characteristic. At the time *DeSantis* was decided, however, same-sex sexual orientation was popularly understood to be volitional (as many people still believe).

The *DeSantis* court also relied heavily upon Congress' refusal to extend Title VII protection to "homosexuals" on the basis of sexual orientation.[61] Because this reliance makes little sense standing alone (since the plaintiffs' claims were all based upon sex, not sexual orientation),[62] it must be looked at in the context of the entire opinion, as well as the opinions it cites—namely, *Smith v. Liberty Mutual Insurance Co.*[63] and *Holloway v. Arthur Andersen & Co.*[64] As argued elsewhere, the workplace appearance cases, transsexual cases, and "homosexual" cases all combine to preserve the gender status quo.[65] More importantly for these purposes, however, they all do so by appealing, sometimes quite subtly, to notions of voluntarism.

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[59] DeSantis v. Pac. Tel. & Tel. Co., 608 F.2d 327, 333 (9th Cir. 1979).

[60] *Id.* at 329–30.

[61] *Id.* at 329.

[62] The *DeSantis* plaintiffs used five strategies: straight disparate treatment (meaning that homosexuality falls within the meaning of sex in Title VII); disparate impact (claiming that anti-gay employment policies disproportionately affected male workers, who were more likely to be "homosexual" or more likely to be discovered); different employment criteria (that is, men who prefer men are treated differently from women who prefer men); interference with association (based upon EEOC decisions holding that discrimination against an employee on the basis of the race of her friends was race discrimination); and, for one of the plaintiffs, a sex-stereotyping disparate treatment claim (based upon the fact that he was fired for wearing an earring). *Id.* at 329–32.

[63] Smith v. Liberty Mut. Ins. Co., 569 F.2d 325 (5th Cir. 1978) (holding that Title VII was not violated by an employer's refusal to hire an applicant because he believed the applicant was effeminate).

[64] Holloway v. Arthur Andersen & Co., 566 F.2d 659 (9th Cir. 1977).

[65] *See* Sandi Farrell, *Reconsidering the Gender-Equality Perspective for Understanding LGBT Rights*, 13 L. & SEXUALITY (forthcoming 2004) (suggesting that such cases reflect the way judges deal with gender non-conformity).

5. *Sexual Harassment*

In the context of sexual harassment, the ideology of voluntarism may be most clearly seen in the requirement that the harassment be "unwelcome." The textbook case of *Meritor Savings Bank v. Vinson* is instructive.[66] *Meritor Savings Bank* involved a female bank teller who was propositioned by her lecherous supervisor and, in fear of losing her job, submitted to his advances for a period of about three years.[67] Vinson was subsequently discharged for excessive use of sick leave and sued the bank for the sexual harassment she had been subjected to during her employment. In affirming the appellate court, the Supreme Court elaborated on the "unwelcomeness" requirement.[68] The district court had found that the sexual relationship between Vinson and her supervisor was voluntary and thus that there was no cognizable Title VII claim.[69] The Court clarified its perceived distinction between voluntariness and unwelcomeness:

> [T]he fact that sex-related conduct was "voluntary," in the sense that the complainant was not forced to participate against her will, is not a defense to a sexual harassment suit . . . . The gravamen of any sexual harassment claim is that the alleged sexual advances were "unwelcome."
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> . . . [But] [w]hile "voluntariness" in the sense of consent is not a defense to such a claim, it does not follow that a complainant's sexually provocative speech or dress is irrelevant as a matter of law in determining whether he or she found particular sexual advances unwelcome. To the contrary, such evidence is obviously relevant.[70]

Many commentators have rightly criticized the unwelcomeness requirement and the admissibility of evidence of plaintiffs' speech and dress.[71] Despite

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[66] Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

[67] *Id.* at 60.

[68] *Id.* at 68–69; *see also* 29 C.F.R. § 1604.11(a) (1985) (establishing the "unwelcomeness" requirement).

[69] *See* Vinson v. Taylor, 23 Fair Empl. Prac. Cas. (BNA) 37 (D.D.C. 1980), *rev'd*, 753 F.2d 141 (D.C. Cir. 1985), *aff'd sub nom.* Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

[70] *Meritor Savings Bank*, 477 U.S. at 68–69.

[71] *See, e.g.*, Christina A. Bull, Comment, *The Implications of Admitting Evidence of a Sexual Harassment Plaintiff's Speech and Dress in the Aftermath of* Meritor Savings Bank v. Vinson, 41 UCLA L. REV. 117 (1993); Ann C. Juliano, Note, *Did She Ask for It?: The "Unwelcome" Requirement in Sexual Harassment Cases*, 77 CORNELL L. REV. 1558 (1992).

the Court's "generous" refusal to hold Vinson blameworthy for not having rebuffed her supervisor's advances, as had the district court, its characterization of the unwelcomeness requirement delineated a regime in which only victims who conformed to the most circumspect standards of dress and behavior could hope to gain relief. As in rape cases, the sexualized victim is not an authentic victim in this view. The "voluntary" choice to talk or dress provocatively (itself a problematic word, placing the blame on the speaker or wearer rather than the listener or observer) can undermine or destroy a sexual harassment victim's case, regardless of its merits.

B. Race/National Origin

1. *The Lack of Interest Argument*

As in sex-based cases challenging job segregation, employers have defended against such claims by offering the lack of interest argument.[72] Perhaps the most pointed example of judicial acceptance of such an argument came in *Wards Cove Packing Co. v. Atonio*.[73] The Supreme Court found against the plaintiffs in *Wards Cove*[74] in a disparate impact case involving a cannery in Alaska that was highly segregated by race—the noncannery jobs were filled mostly by white mainlanders and the lower-paying, lower-status cannery positions were occupied mostly by native Alaskans and other workers of color.[75] In rejecting the plaintiffs' disparate impact claim, the Court emphasized both the interest and qualifications of the cannery workers in noncannery jobs.[76]

First, according to the Court, the proportion of cannery workers who were nonwhite was not an appropriate figure to compare to the racial composition of the noncannery workforce because the cannery workers were not qualified for some of the noncannery jobs. Thus, the Court reasoned, "[i]f the absence of minorities holding such skilled positions is

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[72] *See* Schultz & Petterson, *supra* note 28, at 1077.

[73] Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989).

[74] I am greatly indebted to Professor Vicki Schultz for highlighting this aspect of *Wards Cove* in her Employment Discrimination course.

[75] *Wards Cove*, 490 U.S. at 650. In addition to the actual job segregation, the workers were housed and fed in separate facilities, leading Justice Stevens to liken the cannery to a plantation economy in his dissent. *See id.* at 663 (Stevens, J., dissenting). Thankfully, the *Wards Cove* decision aroused so much controversy that Congress explicitly overruled portions of the opinion in 1991. Civil Rights Act of 1991, 42 U.S.C. § 1981 (1991).

[76] *Wards Cove*, 490 U.S. at 651–54.

due to a dearth of qualified nonwhite applicants (for reasons that are not [the cannery's] fault), [its] selection methods or employment practices cannot be said to have had a 'disparate impact' on nonwhites."[77] This is an indirect appeal to voluntarist ideas. The Court's unstated implication is that because the cannery is not at fault for the lack of qualified nonwhite applicants, it must be the nonwhite cannery workers, or nonwhites in general, who are to blame for their own lack of qualifications.

Next, the Court addressed the lack of interest argument directly, stating that characterizing the cannery workers as the potential labor pool, even for the unskilled noncannery positions for which they arguably were qualified, was flawed. The reason, the Court argues, is that "the vast majority of these cannery workers did not seek jobs in unskilled noncannery positions; [and] there is no showing that many of them would have done so even if none of the [employment] practices existed."[78] The reasonable inference here is that the Court believed that the cannery workers spent their days surrounded by smelly salmon guts because they *chose* to do so. By accepting the lack of interest argument, the Court implicitly blames the cannery workers who were challenging the job segregation at the cannery for the very existence of that job segregation.

2. *Workplace Appearance*

Also paralleling the context of sex, racially discriminatory dress and grooming policies have generally survived Title VII challenges. Here, though, the policies are not facially discriminatory in the sense that they dictate different standards for different races. Rather, they discriminate by affecting one race disproportionately, although they are often upheld because that fact is difficult to prove. Perhaps the most well-known example of such a case is *Rogers v. American Airlines, Inc.*, in which the employer's policy prohibiting the wearing of all-braided hairstyles by some classes of employees was found not to discriminate on the basis of race or sex.[79] Among the court's justifications for ruling against the plaintiff was an appeal to notions of voluntarism. As Professor Paulette Caldwell explains:

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[77] *Id.* at 651–52 (footnote omitted).

[78] *Id.* at 653–54.

[79] Rogers v. Am. Airlines, Inc., 527 F. Supp. 229 (S.D.N.Y. 1981). For an excellent discussion of the *Rogers* case and related issues, see Caldwell, *supra* note 26.

> The court conceived of race and the legal protection against racism almost exclusively in biological terms. Natural hairstyles—or at least some of them, such as Afros—are permitted because hair texture is immutable, a matter over which individuals have no choice. Braids, however, are the products of artifice—a cultural practice—and are therefore mutable, i.e., the result of choice. Because the plaintiff could have altered the all-braided hairstyle in the exercise of her own volition, American [Airlines] was legally authorized to force that choice upon her.[80]

Another, more recent example of a racially discriminatory grooming policy upheld implicitly referencing choice is *Santee v. Windsor Court Hotel L.P.*[81] In *Santee*, the plaintiff, an African-American woman, was denied a job as a housekeeper in the defendant's hotel because her hair was dyed blonde, allegedly in contravention of the hotel's policy prohibiting employees "from having extremes in hair color."[82] As is typical in so-called "grooming" cases, the court found that the plaintiff's "claim is based on her hair color, not her race . . . . An employer's grooming code constitutes discrimination based on grooming standards; consequently, such a code lies outside the realm of the Civil Rights Act."[83]

What the *Santee* court failed to recognize is that by typical standards, blonde is not an extreme hair color. It was only perceived as extreme by the hotel because Santee was African-American rather than white, and thus her hair color was not "natural." This despite the fact that countless other naturally brunette women dye their hair blonde with impunity, and presumably would not be denied a job by the hotel for having an "extreme" hair color. The unstated premise upon which the court relies is that because Santee had *chosen* to dye her hair blonde, a privilege apparently available only to white women[84] and then *chose* not to alter her blonde hair at the request of her interviewer,[85] she also chose to forfeit a job opportunity. This

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[80] Caldwell, *supra* note 26, at 378–79 (footnote omitted).

[81] Santee v. Windsor Court Hotel L.P., No. CIV.A.99-3891, 2000 WL 1610775 (E.D. La. Oct. 26, 2000).

[82] *Id.* at *1.

[83] *Id.* at *3.

[84] Because the "hiring policy . . . makes distinctions based on the employer's subjective determination of what constitutes an 'extreme' hair color" and because "it is not the role of [the] court to decide what is and is not 'extreme' under the [employer's] grooming policy," it is unclear whether a Latino or Asian-American woman with blonde hair would be in violation of the policy. *Id.* at *3–*4.

[85] *Id.* at *1.

premise is alluded to when the court notes that "[e]mployers are only prohibited from discriminating against employees on the basis of immutable characteristics such as race and national origin."[86] Once again, the language of voluntarism is utilized to deny Title VII relief to a plaintiff with an otherwise meritorious claim.

3. *English-Only Rules*

Another much-discussed context in which courts have relied upon notions of agency to justify denying plaintiffs' proposed relief is in the national origin context of language discrimination, specifically in cases in which employers demand that bilingual employees speak only English in the workplace.[87] The leading case in this area is *Garcia v. Gloor*, in which the Fifth Circuit held that such a policy did not violate Title VII's prohibition of discrimination based upon national origin.[88] According to the court, the policy did not implicate Title VII because it discriminated on the basis of Garcia's "preferred" language, not on the basis of national origin.[89] Predictably, it was the allegedly elective nature of Garcia's insubordination that seemed to most move the court to reject his national origin discrimination claim.

One could argue that it was not only the voluntariness of Garcia speaking Spanish that doomed his employment discrimination claim. Instead, lurking in the background of the analysis of the national origin claim were the employer's contentions that Garcia was an all-around inferior employee who deserved to be terminated because he was lazy and defiant.[90] It is likely that this backdrop had at least some effect on the enthusiasm with which the court found in the employer's favor and the zeal with which it emphasized the role of Garcia's choices in his own termination.

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[86] *Id.* at *3.

[87] For academic commentary on this issue, see *supra* note 27. In addition, in Professor Vicki Schultz's course lectures in Employment Discrimination, she pointedly criticized the English-only cases for relying on notions of choice, for which I credit my recognition of the centrality of voluntarism to the decisions.

[88] Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980).

[89] *Id.* at 268.

[90] *Id.* at 266–67 (noting that the employer testified that "Mr. Garcia's discharge was for a combination of deficiencies [such as] failure to keep his inventory current, failure to replenish the stock on display from stored merchandise, failure to keep his area clean and failure to respond to numerous reprimands as well as for violation of the English-only rule").

The *Gloor* opinion is remarkable in its use of voluntarist rhetoric. The words "choice," "choose," "chose," "preference," "prefer," and "preferred" are used no less than nineteen times in the portion of the opinion dealing with the substance of the national origin claim.[91] Interestingly, the *Gloor* court relied heavily on the *Willingham* hair-length opinion,[92] indicating that it construed Garcia's claim as "national origin-plus" so that it could place the same restrictions on the kinds of traits that could be the basis of such a claim as were created for the sex-plus cases.[93] Thus, the court itself explicitly tied the two kinds of cases together based on their key shared characteristic—that the plaintiffs could not recover for discrimination based upon a supposedly voluntary trait or behavior.

The other "textbook" case concerning English-only rules is *Garcia v. Spun Steak Co.*, in which the Ninth Circuit followed the *Gloor* decision in refusing to invalidate an employer's English-only policy.[94] The interesting thing about *Spun Steak*, for these purposes, is the facts of the case and how they might have influenced the court's decision. In *Gloor*, the background facts revealed an employer bent on ridding itself of a perceived problem employee, whereas *Spun Steak* concerned an employer attempting to deal with the harassment of non-Spanish-speaking employees by the Spanish-speaking plaintiffs.[95] Thus, *Spun Steak* provides another example of a case in which plaintiffs' voluntary behavior—besides that which is being contested—arguably had some effect on the willingness of the court to find in their favor. The court in *Spun Steak* could not perceive the plaintiffs as victims of national origin discrimination when evidence indicated that they themselves had engaged in race discrimination against their co-workers. Of course, *Spun Steak* did not address a question of first impression as did *Gloor*; however, *Spun Steak* was seemingly a reversal of a previous Ninth Circuit ruling that an English-only rule did violate Title VII.[96]

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[91] *Id.* at 268–71.

[92] *See* discussion *infra* notes 39–45 and accompanying text.

[93] *See Gloor*, 618 F.2d at 269 (asserting that "[s]ave for religion, the discriminations on which the Act focuses its laser of prohibition are those that are either beyond the victim's power to alter, . . . or that impose a burden on an employee on one of the prohibited bases" (internal quotation omitted)).

[94] Garcia v. Spun Steak Co., 998 F.2d 1480, 1487 (9th Cir. 1993).

[95] *Id.* at 1483 (noting that the English-only policy was adopted after management had received complaints that the plaintiffs had "made derogatory, racist comments in Spanish about two co-workers, one of whom is African-American and the other Chinese-American").

[96] *See* Gutierrez v. Mun. Court, 838 F.2d 1031 (9th Cir. 1988), *vacated as moot*, 490 U.S. 1016 (1989). Of course, the *Spun Steak* court conveniently diminished the relevance of the *Gutierrez* holding because it was vacated. *Spun Steak*, 998 F.2d at 1487 n.1.

C. *Religion*

The case of religion offers an interesting lens through which to view the sex, race, and national origin cases discussed above. Because religion is regarded as a mutable characteristic that is nevertheless protected, some commentators have suggested that the accommodation approach to religion be imported into contexts such as race and national origin.[97] Professor Karen Engle points out that such suggestions erroneously assume that religion is treated differently from race, sex, and national origin in Title VII jurisprudence.[98]

In the early Title VII religion cases, Engle argues, courts drew the same distinction between volitional conduct and status as had been drawn in the race and sex cases. Then in 1972 Congress amended Title VII to protect religious observance as well as belief, which was supposed to eliminate the status-conduct distinction with respect to religion.[99] From 1972 to 1980, much of the litigation centered around the definition of religion, until the EEOC issued guidelines defining religion in 1980.[100] Since then, the main question that courts examine is whether making the accommodation for the religious employee would cause an undue burden on the employer.

Despite the introduction of an accommodationist standard for religion, Engle argues, the outcomes in religion cases have been similar to those in race and sex cases involving the status-conduct distinction.[101] One reason for this, she contends, is that courts have a hard time swallowing the notion

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[97] *See, e.g.*, PIATT, *supra* note 26, at 116 (citing religion as an example of a protected mutable characteristic that, like culture, is formative of the individual's world view); Neil Gotanda, *A Critique of "Our Constitution Is Color-Blind"*, 44 STAN. L. REV. 1, 65 (1991) (calling for a religion-type approach to race in constitutional jurisprudence that would recognize the exercise of race-culture as a fundamental right); Perea, *supra* note 27, at 866–67 (arguing that ethnicity should be treated like religion in that mutability is irrelevant because religion goes to the heart of individual identity).

[98] Engle, *supra* note 21, at 357–407 (discussing the history of judicial interpretations of religion under Title VII and concluding that religion cases have not been treated significantly differently).

[99] *Id.* at 354. Interestingly, between 1972 and 1980 (when the EEOC issued a broad definition of religion), the courts often recognized another type of voluntarist idea in attempting to define religion under Title VII—that beliefs and observances that were directed by a church were protected, and those which were not, were not protected because they were characterized as a matter of personal preference and not beyond the individual's control. *Id.* at 373–74.

[100] *See id.* at 372–87.

[101] *Id.* at 360.

that they should force employers to treat some employees differently from others under an antidiscrimination statute.[102] Another is that the religion cases, like the race and sex cases, involve judicial balancing of the interests of employees versus employers, and courts are generally reticent to place much of a burden on employers.[103]

As discussed above, the religion cases progressed through three distinct periods. During the first two, notions of individual agency and choice were utilized to deny relief to plaintiffs. Before 1972, the trend was to consider belief an unchangeable status (or a status which an employer could not require an employee to change) and observance as a matter of individual choice. From 1972 to 1980, observances compelled by an institutionalized religion were deemed protected, while those that were based on personal conviction were often regarded as merely personal preferences and thus, unprotected. After 1980, the courts have not been as able to employ voluntarist ideas in finding for employers because they have focused on the hardship that accommodation causes the employer rather than the effect on the employee of whether she is accommodated.

The trajectory of the religious discrimination claim toward the question of undue burden and reasonable accommodation was facilitated and influenced by the only two Supreme Court cases addressing Title VII religion claims: *Trans World Airlines, Inc. v. Hardison*[104] and *Ansonia Board of Education v. Philbrook*.[105] These cases also emphasize the differences in how religion is treated compared to race, sex and national origin. Both cases involved members of the Worldwide Church of God who came into conflict with their employers over the issue of not working on certain days because of their religious beliefs. In *Hardison*, the plaintiff was discharged because he refused to work Saturdays;[106] in *Philbrook*, the plaintiff claimed that the local school board's policy of allowing three days leave for religious observance but not allowing employees to use sick leave or personal leave for additional holy days violated Title VII.[107] In both cases, the Court found in favor of the employers and addressed the issues of undue hardship and reasonable accommodation, respectively. The holding in *Hardison*, essentially, amounted to the idea that any cost to an employer in accommodating an employee's religion that is more than de minimis is

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[102] *See id.* at 360–61.

[103] *See id.* at 361.

[104] Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

[105] Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60 (1986).

[106] *Hardison*, 432 U.S. at 69.

[107] *Philbrook*, 479 U.S. at 65.

an undue burden.[108] In *Philbrook*, the Court held that an employer's obligation under § 701(j) is met when it offers the employee a reasonable accommodation, whether or not that accommodation is acceptable to the employee.[109]

Thus, despite the difference in focus between the religion cases and the other Title VII contexts, the outcomes have remained the same—plaintiffs rarely win, and when they do, it is usually because the employer did not even attempt to accommodate their religious needs.[110] One similarity between these outcomes is that employers are only rarely subject to Title VII liability, usually in cases of egregious discrimination. But, lurking behind the outcomes of the religion cases is a perception that observing a holy day is a personal choice, that it is not compelled in any meaningful way, and that in the grand scheme of things, it is far too unimportant to really amount to legally remediable discrimination. Religion, then, is a context in which voluntarist ideas have been officially rejected but covertly remain relevant. This weighs in favor of the need to openly recognize and challenge voluntarism in employment discrimination law as a whole, lest it infect even those contexts in which it has been formally decreed irrelevant.

D. Disparate Impact and the Case of Arrest and Conviction Records

The disparate impact cause of action may be said to implicitly endorse the belief that not all discrimination can be explained by reference to notions of individual bias against a group visited upon one member or all members of that group. "Disparate impact" often means that the discrimination at issue is not intentional but rather that the employment criteria complained of operates to freeze in place the existing social structure and allocation of resources. Indeed, intent is never at issue in disparate impact cases, even where courts may suspect that it exists.[111]

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[108] *Hardison*, 432 U.S. at 84.

[109] *Philbrook*, 479 U.S. at 68–69.

[110] *See, e.g.*, EEOC v. Ithaca Indus., Inc., 849 F.2d 116, 118 (4th Cir. 1988) (holding that employer's failure to attempt to accommodate employee's religiously-based need not to work on Sunday violated Title VII); *see also* Engle, *supra* note 21, at 388.

[111] There has been a recent increase in scholarship about the relationship between intent and discrimination, based on social science research suggesting that most discrimination is indeed unintentional. One of the early and stellar works on unconscious discrimination was written by critical race theorist Charles Lawrence.

Intent, in this analysis, bears an important relationship to the notions of voluntarism critiqued in this Article. One can argue that intent to discriminate is necessary to place moral blame—an idea that seems to increasingly animate the courts' response to disparate impact suits. When an employer is sued for discrimination with a disparate impact claim, by definition that employer cannot be held morally culpable by the court for that discrimination, but it can be held legally culpable. The need to find moral fault somewhere seems to lead the courts to search for ways in which to place such blame on the plaintiffs. Unfortunately, when courts place moral blame on plaintiffs (deservedly or not), they often also refuse to place any legal responsibility on the employer.

One way in which courts place moral blame on victims of discrimination is through appeals to voluntarist ideology. In other words, courts often implicitly say, "if you had done (or not done) *X*, we would not be here in court today because no adverse employment action would have been taken; therefore it is your fault, and we will not reward you for a situation that was of your own making." It is easier for courts to go this route in disparate impact cases because of the impossibility of placing moral culpability on the employer. It is also easier to revert to voluntarism when the trait at issue may be characterized as within the control of the victim.

In some cases, employment criteria that affect one group disproportionately may be said to be immutable—for example, height and weight requirements for prison guards in Alabama prisons that excluded many women from those jobs[112]—but in many cases, such criteria cannot be designated immutable. In fact, the case that created the disparate impact cause of action, *Griggs v. Duke Power Co.*, involved the use of a standardized test and a high school diploma requirement for certain jobs that disproportionately affected African-American job applicants.[113] Clearly,

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See Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987). More recent works on the problematic relationship between intent and discrimination include David Crump, *Evidence, Race, Intent, and Evil: The Paradox of Purposelessness in the Constitutional Race Discrimination Cases*, 27 HOFSTRA L. REV. 285 (1998); Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Ann C. McGinley, *¡Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL'Y 415 (2000); Deana A. Pollard, *Unconscious Bias and Self-Critical Analysis: The Case for a Qualified Evidentiary Equal Employment Opportunity Privilege*, 74 WASH. L. REV. 913 (1999); Amy L. Wax, *Discrimination As Accident*, 74 IND. L.J. 1129 (1999).

[112] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977).

[113] Griggs v. Duke Power Co., 401 U.S. 424 (1971).

one's performance on a standardized test and whether one graduates from high school are not "immutable" in any traditional sense of the word. Nor are they "statuses" in the sense that race and sex are statuses. The Court, however, did not consider the mutability of the criteria or the status/conduct distinction relevant to its decision in the case in large part because it took into account the social, economic, and educational discriminatory factors that influenced the job criteria's unequal impact on African-Americans.

Justice Burger stated: "Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[114] He went on to explain that African-Americans had received inferior education in segregated schools, accounting for their lower test scores.[115] Arguably, the Court could have simply stated that it was up to the plaintiff class whether or not they obtained high school diplomas and that the employer was not responsible for the disparity in test scores. Such an argument would have made at least as much sense as the invocations of voluntarist rhetoric in some of the other contexts discussed in this Article.

Judicial commitment to recognizing and taking into account discriminatory conditions that precede the workplace has waned considerably since *Griggs* was decided, which in large part explains the winnowing away of the disparate impact cause of action, particularly in the past twenty years or so. In fact, given the increase in acceptance of the lack of interest argument in later race cases, the *Griggs* Court's beneficence seems to be the product of a bygone era. In some sense, the outcome in *Griggs* and the contrasting outcome in *Wards Cove* may be reconciled by simply recognizing this: in 1971, many courts were predisposed to believe that job segregation by race was due to discrimination, on the part of employers and society in general, and to hold employers responsible for remedying that segregation in their workplaces. By 1989, most courts were predisposed to believe that job segregation by race was not due to discrimination but to lack of interest, initiative, or sheer merit on the part of workers of color, for which employers should not be held responsible. The rise of voluntarist rhetoric coincided with this shift in attitudes.

An illustrative example of this phenomenon may be seen in the history of challenges to employer policies that preclude or inhibit the hiring of persons with arrest and conviction records. Such policies have been challenged as having a racially disparate impact upon workers of color, who are statistically more likely to have been arrested or convicted of a

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[114] *Id.* at 430.

[115] *Id.*

crime.[116] The outcomes in these cases, consistent with the outcomes of many Title VII cases, were mixed at first and became decidedly anti-plaintiff over time. Many plaintiffs fail to make out a prima facie case;[117] those who do make out a prima facie case generally fail (or at least experience equivocal success) at the business necessity stage.[118]

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[116] *See* Linda Lye, Comment, *Title VII's Tangled Tale: The Erosion and Confusion of Disparate Impact and the Business Necessity Defense*, 19 BERKELEY J. EMP. & LAB. L. 315, 335–36 (1998). In general, courts have looked upon consideration of arrest records in hiring far less favorably than use of conviction records. Because an arrest carries no inference of guilt, it is difficult for an employer to produce a business necessity justification for an arrest record policy. *See, e.g.*, Reynolds v. Sheet Metal Workers, Local 102, 498 F. Supp. 952, 973 (D.D.C. 1980), *aff'd*, 702 F.2d 221 (D.C. Cir. 1981) (holding that because employer failed to show that arrest record inquiries were job related, such inquiries must be eliminated from the hiring process); Gregory v. Litton Sys., Inc., 316 F. Supp. 401, 403 (C.D. Cal. 1970) (holding that employer's policy barring individuals with arrest records from employment unlawfully discriminated against African-American applicants), *modified*, 472 F.2d 631 (9th Cir. 1972).

[117] *See, e.g.*, Cross v. United States Postal Serv., 639 F.2d 409 (8th Cir. 1981) (holding that plaintiff had failed to establish a prima facie case in a disparate impact case because she had not shown that Postal Service had a policy of rejecting applicants with criminal conviction records); Webster v. Redmond, 599 F.2d 793 (7th Cir. 1979) (plaintiff failed to show pattern or practice of use of arrest records in disparate treatment claim); Matthews v. Runyon, 860 F. Supp. 1347 (E.D. Wis. 1994) (plaintiff did not present statistics showing that there was a racial disparity in defendant's workplace or that any actual disparity was caused by its arrest-record policy); Ray v. Frank, 56 Fair Empl. Prac. Cas. (BNA) 696 (W.D. Mo. 1990) (plaintiff showed disparate treatment but not disparate impact where alternate policy existed for hiring applicants with drivers license suspensions due to non-moving violations and employer failed to apply this policy to hire plaintiff); EEOC v. Carolina Freight Carriers Corp., 723 F. Supp. 734 (S.D. Fla. 1989) (plaintiff failed to show disparity between number of Hispanics and non-Hispanics employed by defendant or that any disparity was caused by no-conviction policy); Smith v. Am. Serv. Co., Inc., 611 F. Supp. 321 (N.D. Ga. 1984) (plaintiff failed to establish existence of a policy of not hiring applicants with arrest records or that her record was reason for employer's refusal to hire her), *aff'd in relevant part, vacated in part on other grounds*, 796 F.2d 1430 (11th Cir. 1986); Hill v. United States Postal Serv., 522 F. Supp. 1283 (S.D.N.Y. 1981) (plaintiff did not make out prima facie case because Postal Service considered criminal record as one factor but did not impose absolute bar on hiring applicants with criminal records).

[118] *See* Green v. Mo. Pac. R.R. Co., 549 F.2d 1158 (8th Cir. 1977) (affirming an injunction that allowed the use of conviction records in hiring if the nature and seriousness of the offense, length of time since conviction, and nature of the job were taken into account); Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971)

The amazing thing about the early cases concerning the use of arrest and conviction records in hiring is the complete absence of the voluntarist rhetoric so prevalent in cases in the contexts previously discussed. The courts stuck to the facts and the procedures for determining whether the at-issue policies in fact had a disparate impact on workers of color and, if so, whether the policies were justified by business necessity. Despite the fact that no court has held that conviction records could never be used in the hiring process, the agency of the convicted applicant to commit crimes or not was never raised as a relevant consideration. Why, in the context in which courts would arguably have the clearest and most justifiable opportunity to blame the discriminatee for her plight, did the voluntarism rhetoric the courts were so fond of in other Title VII cases never emerge?

Part of the reason lies in the difference between 1971 and 1989: the commitment of many judges in the 1970s to enforce a statute aimed at eliminating stark, highly visible discrimination had eroded by 1989, including the Justices of the Supreme Court, who may have guided the trend. The prevalence and outcomes of arrest and conviction cases support this view. Most of the successful cases were brought in the 1970s, and those that were brought after experienced far less success. The plaintiffs in the 1970s cases were generally able to make out a prima facie case, even where they were often challenging multiple policies.[119] The 1980s cases, and the only 1990s case that considered this issue, uniformly found that the plaintiffs had failed to make out a prima facie case.[120] Of course, this trend is not inconsistent with the movement toward making it more difficult to establish a prima facie case in disparate impact cases generally.

Two of the most recent criminal records cases reflect one wide-ranging difference that the rise of voluntarist ideology in Title VII has had on disparate impact cases. Both decisions make use of an arguably overly-refined conception of relevant labor market to dispute the existence of a racial imbalance in the employers' workforces. In *Matthews v. Runyon*, the

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(holding that a criminal conviction should not constitute an absolute bar to employment, although it may be fairly considered as to its bearing upon an applicant's fitness for the job); Dozier v. Chupka, 395 F. Supp. 836 (S.D. Ohio 1975) (holding that fire department must use consideration of arrest and conviction records in a manner related to job performance); Richardson v. Hotel Corp. of Am., 332 F. Supp. 519 (E.D. La. 1971) (holding that it was reasonable for hotel to require that individuals employed as bellmen have a record free of convictions for property-related crimes), *aff'd*, 468 F.2d 951 (5th Cir. 1972).

[119] *See, e.g.*, *Green*, 549 F.2d at 1158; *Carter*, 452 F.2d at 315; *Dozier*, 395 F. Supp. at 836.

[120] *See* Lye, *supra* note 116 and accompanying text.

court maintained that Matthews had not presented evidence that any fewer African-Americans were hired than were "qualified applicants in the relevant labor market" and thus had failed to establish a prima facie case.[121] Similarly, in *EEOC v. Carolina Freight Carriers Corp.*, the court held that the EEOC was unsuccessful in making out its prima facie case.[122] Although the statistics presented did show that a greater proportion of Hispanics were convicted than non-Hispanics and that, in general, an employment practice that disqualified applicants with theft conviction records would adversely affect Hispanics at a statistically significant rate, the court faulted the EEOC for not presenting statistics that showed that there was a disparity between the number of Hispanics and non-Hispanics in that particular workplace.[123]

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[121] *Matthews*, 860 F. Supp. at 1357 (challenging Postal Service policy of taking arrest record into account in the hiring process).

[122] *Carolina Freight Carriers Corp.*, 723 F. Supp. at 755 (challenging employer policy of refusing to hire any individual who had a criminal conviction for a theft-related crime that resulted in an active prison sentence).

[123] *Id.* at 751. In particular, the court wanted to see applicant flow statistics that in its opinion would demonstrate that the theft-conviction policy actually caused any racial disparity. Applicant flow data are statistics that contrast the racial or gender composition of applicants and hirees for the at-issue jobs. They have come to be seen as probative evidence in Title VII claims because they provide concrete evidence of how the hiring process actually operated. *See generally* RAMONA L. PAETZOLD & STEVEN L. WILLBORN, THE STATISTICS OF DISCRIMINATION § 4.03, at 7 (1998) (providing a model for analyzing employment discrimination cases statistically). Applicant flow data have been criticized for concealing as much as they reveal, however. In demanding that plaintiffs present applicant flow statistics or statistics that show the number of otherwise qualified potential applicants, the courts impose a burden upon Title VII plaintiffs that is legally problematic in two ways. First, the preference for applicant flow data leaves unquestioned the effect of the at-issue criteria on the applicant pool. This flies in the face of previous cases holding that Title VII imposes no requirement that a disparate-impact prima facie case be established only by use of comparative statistics on actual applicants. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 330 (1977) (asserting that the application process might not adequately reflect the potential applicant pool because of such individuals' self-recognized inability to meet discriminatory criteria); Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 369 (1977) (noting that employer's reputation for discrimination may have altered the applicant pool by deterring African-Americans from applying). In supporting this conclusion in *Dothard*, the Court noted that "[t]he application process might itself not adequately reflect the actual potential applicant pool, since otherwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory." *Dothard*, 433 U.S. at 330. The

The requirement that plaintiffs present highly specific statistical evidence and a tight causal connection in order to make out a prima facie case of disparate impact discrimination[124] stems in part from the growing willingness to believe that racial disparities in the labor market are caused by racial differences in merit rather than discrimination. This attitude reflects a sort of broad-scale notion of voluntarism that moves beyond the individual plaintiff and purports to describe that plaintiff's racial group on the basis of presumptions about the individual qualities of its members. Supporters of this argument claim that it is not racial discrimination to reward and punish people on the basis of their individual merits. If some groups just happen to statistically succeed where others happen to fail, discrimination cannot be said to be the cause. If some members of a statistically less successful group do succeed, moreover, this shows that discrimination is not the cause of the rest of the group's failure. This is a version of the conservative argument against affirmative action, another Title VII context that may be said to reflect voluntarist ideology.

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alternative to applicant flow data is statistics showing the number of otherwise qualified minority applicants in the relevant labor market and that a disparity exists between that percentage and the percentage of minorities employed in the at-issue jobs. This alternative presents the Title VII plaintiff with a Hobson's choice, as these data are, for occupations that require specialized education and/or training, often difficult or impossible to gather.

[124] I do not argue that the *Carolina Freight* court created the tough standards to which it held the EEOC. Those standards were put forth by the Supreme Court in cases such as *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994–95 (1988) and *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 653 (1989). In early cases, statistics were not required to be so specific. In *Griggs*, for example, the statistics presented with regard to the high school diploma criterion showed only that twelve percent of African-American males had completed high school in North Carolina, while thirty-four percent of white males had done so. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). In *Dothard*, 433 U.S. at 329 (holding that height and weight requirements had a disparate impact on women in violation of Title VII), the Court had asserted that "(t)here is no requirement . . . that a statistical showing of disproportionate impact must always be based on analysis of the characteristics of the actual applicants." For a case on point that uses general population statistics, see *Haynie v. Chupka*, 17 Fair Empl. Prac. Cas. (BNA) 267 (S.D. Ohio 1976) (holding that general population statistics establishing that 4.2% of local police department personnel were African-American while 18.5% of local population was African-American were sufficient to make out prima facie case of disparate impact). Even if one argues that in these three cases the general population statistics were appropriate because the skills needed for the at-issue jobs were minimal, it is unclear why employment with the Postal Service or at a freight company would require qualifications so much more rare or specialized.

Beyond this more attenuated conception of voluntarism, the court in *Carolina Freight* engaged in the most extended and venomous use of traditional voluntarist analysis encountered in all the Title VII cases. Given the controversial nature of the subject of race and crime, it was surprising that such views had not shown up in this context before, but the court in *Carolina Freight* attempted to make up for lost time when it ranted:

> Obviously a rule refusing honest employment to convicted applicants is going to have a disparate impact upon thieves. That some of these thieves are going to be Hispanic is immaterial. That apparently a higher percentage of Hispanics are convicted of crimes than that of the "White" population may prove a number of things such as: (1) Hispanics are not very good at stealing, (2) Whites are better thieves than Hispanics, (3) none of the above, (4) all of the above.
>
> . . . .
>
> If Hispanics do not wish to be discriminated against because they have been convicted of theft then, they should stop stealing . . . .
>
> In this case, the court will answer a question that federal courts have vacillated on since the adoption of [Title VII]: Can an employer refuse to hire persons convicted of a felony even though it has a disparate impact on minority members?
>
> This court's answer is a firm "Yes."[125]

In general, voluntarism has impacted disparate impact cases because of the more attenuated chain of causation and the need to place moral blame, both of which show up in full force in *Carolina Freight*. That these views are now mainstream points to a pressing need for us to rethink the way we look at causation and responsibility. Clearly, voluntarism alone is insufficient.

III. WHY VOLUNTARISM?

This section examines the question of why voluntarism has exerted such influence over the outcomes of Title VII cases. It is important to note

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[125] *Carolina Freight*, 723 F. Supp. at 753. Contrast this with the view of the court in *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290, 1298–99 (8th Cir. 1975):

> We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed. This is particularly true for blacks who have suffered and still suffer from the burdens of discrimination in our society. To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.

two related but distinct trends in these cases. The first is a judicial predisposition in favor of employee assimilation to dominant cultural norms, which occurs in some of the contexts outlined above. For example, the language cases and dress code cases reflect assimilationist bias, but the lack of interest cases do not. In other words, in lack of interest cases the employer does not necessarily want the plaintiff class of employees to apply for the more highly-rewarded jobs, much less demand that they do so as a condition of employment. In fact, it is unclear whether failing to express interest in such jobs or applying for them would be considered assimilation by the employers. In the dress code cases, on the other hand, employers not only desire assimilation, but require it as a condition of employment.

The second trend is judicial reliance on a set of ideas about individual agency and responsibility to justify decisions that absolve employers from responsibility for various forms of workplace discrimination. This is a separate inquiry from the question of assimilation although it is certainly the case that assimilationist bias contexts comprise a significant share of the use of voluntarist rhetoric. However, the important factors here are why courts have found the language of agency and choice so compelling as to be the preferred vehicle to express their support for employers over employees in both kinds of cases and what that support might signify.

A. The Relevance of Equal Protection

As has been discussed at length by commentators too numerous to name, equal protection jurisprudence is analytically muddled, internally incoherent, and effectually inadequate. One of the primary flaws in equal protection jurisprudence is the so-called immutability factor.[126] The delineation of immutability as a basis for extending heightened protection to groups has been roundly criticized elsewhere for being a false criterion[127] or an ill-advised one.[128] There are some indications that the Supreme Court

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[126] As every first-year law student is aware, modern equal protection jurisprudence evolved primarily from the famous (now perhaps infamous) Footnote Four in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938), from which the immutability criterion may fairly be said to have originated. The criterion was cemented in several later cases. *See, e.g.*, Bowen v. Gilliard, 483 U.S. 587, 602 (1987).

[127] *See, e.g.*, JOHN HART ELY, DEMOCRACY AND DISTRUST 150 (1980); J.M. Balkin, *The Constitution of Status*, 106 YALE L.J. 2313, 2323–24 (1997); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 507–16 (1994).

[128] *See, e.g.*, Yoshino, *supra* note 22, at 504–05.

may be close to officially retiring the immutability criterion—at least from the dominant position it once held.[129] It is clear, however, from reading Title VII decisions from many of the above-discussed contexts that the notion of immutability remains a persuasive ideological framework for many courts in the employment discrimination context. For example, in the dress and grooming cases the courts could not help but point out ad nauseum that hair length, style of dress, and even weight were not immutable as a justification for upholding impermissibly discriminatory standards.[130]

Another problem with equal protection law that has diffused into Title VII jurisprudence is the problem of intent. In the law of equal protection, the government must have intended to discriminate to have committed a constitutional violation; there is no Fourteenth Amendment equivalent to disparate impact analysis.[131] As discussed previously,[132] the Title VII disparate impact cause of action challenges the notion that discrimination is always the result of intent and thus creates the problem of imposing legal liability without a corresponding moral culpability. It is perhaps due in part to the rejection of disproportionate impact analysis in equal protection jurisprudence that courts have such a difficult time accepting that unintentional discrimination should be the basis for employer liability under Title VII as well. It is much easier to explain away unequal results by blaming the individual employee, thereby dispersing the problem and placing the responsibility for societal change away from employers.

Nevertheless, since equal protection and Title VII jurisprudence developed somewhat in tandem, and because each informs the other, this problem cannot be said to originate in equal protection law. Rather, we

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[129] *See id.* at 490–91 (noting that courts have cited academic critiques of immutability, interpreted it expansively, stated that it is a factor rather than a requirement, and omitted it from analyses of the heightened scrutiny test, all of which have cast doubt on its continued vitality).

[130] *See, e.g.*, Earwood v. Cont'l S.E. Lines, Inc., 539 F.2d 1349, 1351 (4th Cir. 1976) (noting that "[h]air length is not an immutable characteristic for it may be changed at will"); Cox v. Delta Air Lines, No. 75-1639-Civ.-CA, 1976 WL 730, *1 (S.D. Fla. Sept. 30, 1976) (holding that "weight is neither an immutable characteristic nor a constitutionally protected category").

[131] *See, e.g.*, Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279–81 (1979) (ruling that a disproportionate impact may be traced to a discriminatory purpose but a neutral law does not alone violate the Equal Protection Clause); Washington v. Davis, 426 U.S. 229, 245–46 (1976) (holding that disproportionate impact is not irrelevant, but it is not *alone* dispositive of the question "is a statute unconstitutionally discriminatory?").

[132] *See infra* notes 111–25 and accompanying text.

must ask how equal protection came to incorporate the immutability and intent elements.

B. The Dominance of Christianity

An often-overlooked factor in explaining American courts' affinity for choice-based rhetoric is the role of Christianity in the development of Anglo-American law and in contemporary American society. Christian doctrine generally stresses the free will of the individual to obey God or to sin, and the exercise of that will in one's life decides her eternal fate.[133] Christianity is and has always been the dominant religion in American society and, indeed, has been the foremost ideology for almost the entirety of recent Western history.[134] Our society is steeped in Christianity-based norms, though this fact is rarely discussed because of the lingering numerical power of Christians and (somewhat paradoxically) the perception that the major non-Christian religions are basically integrated into American culture. In truth, almost all federal judges in the United States are probably members of some Christian denomination. Even if that were not so, however, Christian doctrine has indelibly shaped the formation of our cultural and legal consciousnesses. Thus, it is quite likely that the popularity and ubiquity of the Christian world view that accounts in part for the widespread use of voluntarist rhetoric in judicial reasoning.

C. The Ideology of Merit

Related to, but distinct from, the influence of Christianity's cultural dominance is the "ideology of merit." This is the desire of the individual to attribute her status and achievements to her own character, conduct, and/or intrinsic worth, and the corresponding belief that an individual who fails to achieve has only herself to blame.[135] This idea, which has also been referred

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[133] *See, e.g.*, SMILEY, *supra* note 15, at 58–71 (discussing Christian concept of free will and contrasting it with Aristotelian and modern philosophical views of free will); *cf.* KANE, *supra* note 10, at 7–8 (noting that debates over free will have been a central preoccupation of Christianity and Western intellectual history generally, but that they have also played a role in many other world religions).

[134] *See* STEPHEN M. FELDMAN, PLEASE DON'T WISH ME A MERRY CHRISTMAS: A CRITICAL HISTORY OF THE SEPARATION OF CHURCH AND STATE (1997) (offering a compelling account of Christianity's dominance in America and its role in creating the concept of separation of church and state to further its own ends).

[135] *See* Linda Hamilton Krieger, *Afterword: Socio-Legal Backlash*, 21 BERKELEY J. EMP. & LAB. L. 476, 511–12 (2000) (noting that "a substantial body of research indicates that patterns of causal attribution powerfully affect both people's willingness

to as the "meritocracy myth,"[136] draws on a long cultural legacy of myths and legends that appeal to the desire of Americans to believe that anyone can succeed if she has enough intelligence, perseverance, and work ethic. It is embodied in phrases such as "rags to riches," "self-made man," "pull yourself up by your bootstraps," and "the American dream."

Despite overwhelming evidence to the contrary, Americans have doggedly maintained the belief that economic inequality reflects differences in individual talent and motivation to succeed rather than unequal opportunities and systemic discrimination.[137] The power of this myth or ideology in our cultural consciousness suggests that it forms part of the foundation upon which judges reach their decisions; that is, it is visible on their normative horizons and informs their perceptions of litigants, including plaintiffs in antidiscrimination cases.

D. The Role of Economics

Another important factor that one might argue has a significant effect upon courts' willingness to find for plaintiffs in Title VII cases is the effect of liability for discrimination on the ability of the employer to compete in the marketplace. Two examples of this idea come to mind. First, the business necessity standard of the disparate impact cause of action may be met by showing that discontinuing reliance on the disputed criteria would be costly to the employer.[138] Courts seem reluctant to impose such costs on employers, even in the name of the anti-discrimination principle. On the other hand, in disparate impact cases, courts are unwilling to interpret the business necessity standard in any way favorable to plaintiffs.[139] Second,

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to help a stigmatized other and their support for needs-based distribution in general") (footnote omitted); *see also* IRIS MARION YOUNG, JUSTICE AND THE POLITICS OF DIFFERENCE 200 (1990).

[136] *See, e.g.*, Anne Lawton, *The Meritocracy Myth and the Illusion of Equal Employment Opportunity*, 85 MINN. L. REV. 587, 592–94 (2000).

[137] *See* SONIA OSPINA, ILLUSIONS OF OPPORTUNITY: EMPLOYEE EXPECTATIONS AND WORKPLACE INEQUALITY 13–14 (1996).

[138] *See, e.g.*, Abbott v. Fed. Forge, Inc., 912 F.2d 867, 875 (6th Cir. 1990) (holding that minimizing cost of labor is a legitimate business consideration for Title VII purposes); Spurlock v. United Airlines, 475 F.2d 216, 218–20 (10th Cir. 1972) (holding that costs associated with training are an example of a consideration that qualifies as a business necessity).

[139] On the business necessity standard after the Civil Rights Act of 1991, see generally Michael Carvin, *Disparate Impact Claims Under the New Title VII*, 68 NOTRE DAME L. REV. 1153 (1993) (asserting that *Wards Cove* remains the correct

in workplace appearance cases, the employers and courts have pointed to the right to project a certain image—generally characterized as "conservative" or "business-like"—as a reason to find dress and grooming codes as outside the scope of Title VII altogether.[140] What this implicitly says is that the employer is afraid of customer or employee reaction to, for example, men with long hair, individuals with all-braided hairstyles, or men wearing earrings. For example, in *Oiler v. Winn-Dixie Louisiana, Inc.*, the plaintiff was terminated for cross-dressing in his non-working life.[141] The employer's excuse for the termination was that if Oiler "were recognized by Winn-Dixie customers as a crossdresser, the customers . . . would disapprove of [his] lifestyle. . . . [T]hey would shop elsewhere and Winn-Dixie would lose business."[142] Perhaps unsurprisingly, the court found for Winn-Dixie on summary judgment.[143]

E. The Goal of Maintaining the Status Quo

Ultimately, the above reasons are helpful in understanding the courts' reliance on voluntarism, but they fail to provide a complete account of it. Because there are exceptions to the use of voluntarist precepts, voluntarism itself is not the organizing principle around which the courts have based their interpretations of Title VII in particular contexts. Rather, it is merely an attractive medium through which to express some other principle(s), as yet unarticulated by the courts.

In examining the above cases, it is impossible to overlook the fact that courts discuss not just the choices of the employee—to wear his hair long,

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standard after the 1991 Act); Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387 (1996) (arguing for a strict business necessity standard under the Act); Andrew J. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479 (1996) (describing the positions of both proponents of a strict standard and those who argue that the *Wards Cove* standard survives the Act); Note, *The Civil Rights Act of 1991: The Business Necessity Standard*, 106 HARV. L. REV. 896 (1993) (arguing that the Act overruled the *Wards Cove* standard of business necessity).

[140] *See, e.g.*, Rogers v. Am. Airlines, Inc., 527 F. Supp. 229, 233 (S.D.N.Y. 1981) (noting that defendant asserted that its no-braids policy "was adopted in order to help American project a conservative and business-like image"); Fagan v. Nat'l Cash Register Co., 481 F.2d 1115, 1124–25 (D.C. Cir. 1973).

[141] Oiler v. Winn-Dixie La., Inc., No. 00-3114, 2002 WL 31098541, at *2 (E.D. La. Sept. 16, 2002).

[142] *Id.*

[143] *Id.* at *8.

to speak Spanish, to observe religious holidays, to apply for certain positions—but also the choices of the employer. Ironically, although in some cases the courts have treated employees' right to choose as trivial, they have often simultaneously magnified the importance of the employer's interest in regulating the workplace.[144] Certainly, employers have some interest in dictating how their employees behave during working hours; under Title VII, the touchstone of this inquiry is whether the regulation in question is job-related and necessary to running its business (for disparate impact claims) or a bona fide occupational qualification (for disparate treatment claims). As it stands now, though, the courts have ceded so much regulatory freedom to employers that the effectuation of Title VII's goals has been severely compromised.

This preference for the prerogatives of employers cannot be explained away simply by musing that courts are taking into account employers' fear that their ability to be competitive in the marketplace would be undermined by overzealous enforcement of Title VII, or the courts' own fear that the federal judicial system would be overburdened with employment discrimination claims as a result of such enforcement. Though these concerns are understandable, they cannot fully explain the elevation of an employer's right to determine "how best to run [its] shop"[145] over the statutorily-given right of the employee to be free from discrimination on the prohibited bases. This is demonstrated by the fact that in some contexts—notably the lack of interest argument and the unwelcomeness requirement in sexual harassment—it is the employees' choices that are the most significant to the courts, while the employer's choices and consequences flowing from them recede into the background. In fact, the narrowness with which Title VII has been interpreted, particularly in the past twenty years, has comparatively little to do with money, employers, or crowded court dockets, and much more to do with the conservative backlash[146] against the cultural revolution that occurred in the mid-twentieth century.

For example, Schultz and Petterson documented a correlation between the rise of certain neo-conservative beliefs, such as a belief that workplace discrimination is no longer a significant force for workers of color and that affirmative action is thus unjustified, and judicial acceptance of the lack of

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[144] *See* Bartlett, *supra* note 37, at 2556–59; Engle, *supra* note 21, at 350–52; Klare, *supra* note 37, at 1400–01.

[145] Willingham v. Macon Tel. Publ'g Co., 507 F.2d 1084, 1092 (5th Cir. 1975).

[146] Though the word "backlash" is hackneyed, I believe it is an apt way to describe the cultural trends that have sought to undermine the antisubordination project for the past thirty years or so. *See* Krieger, *supra* note 135.

interest argument in race cases.[147] The effect of the increased acceptance of the lack of interest argument by the courts, predictably, is the unchecked perpetuation of de facto job segregation. The perspective that this is beyond Title VII's reach is fully consistent with what Anne Lawton calls the "meritocracy myth"—the belief that employment discrimination is anomalous and that unequal employment outcomes are not the result of discrimination but of differences in innate ability, willingness to work hard, and the like.[148] The trend in the outcomes of the arrest and conviction records cases also reflects the ascendancy of these ideas in the American consciousness in the past few decades.

In fact, egregious stereotypes permeate most of the contexts discussed above in which voluntarism rhetoric showed up. For instance, the dress and grooming cases in the context of race reflect anglocentric views of what hair should look like and how it should be styled and give employers the right to impose those racist views on their employees.[149] The English-only cases exhibit antiimmigrant and racial biases and parallel the rise of the movement to have English declared the official language of the United States and individual states. The unwelcomeness requirement in sexual harassment cases suggests sexist stereotypes of women as powerful temptresses who lead men on and then dishonestly cry sexual harassment. The sex-based dress and grooming cases, the sexual orientation cases, and the transsexual cases all serve to police the gender lines that the feminist and gay rights movements of the 1960s and 1970s had sought to blur by narrowly defining sex discrimination.

All of these phenomena are related to each other and provide the foundation upon which much of Title VII jurisprudence has been built. Of course, this means that the courts have, through creative interpretation motivated by the very biases it was designed to address, reduced a potentially transformative statute to little more than a wistful memory of what might have been. Professor Linda Hamilton Krieger describes this process eloquently:

> Biased judicial . . . construal can result from . . . subtle mechanisms through which entrenched norms and institutionalized practices, operating as taken-for-granted background rules, systematically skew the interpretations of transformative legal rules so that those rules increasingly come to resemble the normative and institutional systems they were intended to

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[147] *See* Schultz & Petterson, *supra* note 28, at 1087–89.

[148] *See* Lawton, *supra* note 136, at 592–99.

[149] *See* Caldwell, *supra* note 26.

> displace. Eventually, if these interpretive biases operate unconstrained, the new transformative law may provide a vehicle for the reassertion and relegitimation of the very norms and institutions it was designed to undermine.[150]

As this Article has shown, in many cases voluntarist rhetoric has been the courts' weapon of choice in gutting Title VII of its transformative potential. For reasons explained below, its use was improper.

IV. TOWARD GETTING BEYOND THE BLAME GAME

This section contests the courts' flippant assignments of blame to the actions or characteristics of the plaintiffs in the Title VII contexts discussed in Part II. Even if the plaintiffs themselves contributed in some way to the situations that led to the lawsuits, the use of voluntarist ideology to justify decisions in favor of employers is deficient, both because it is victim-blaming and because it does not appropriately address the merits of an employment discrimination claim. Other commentators have reached this conclusion; however, this Article takes this concept a step further and argues that appeals to voluntarism should be abandoned because their veracity is questionable. In other words, it is impossible to know for certain whose choices and which choices are freely made or how freely they are made. Moreover, when the employer's desired outcomes as to the at-issue choices are more well-represented among those who already enjoy race, gender, religious, and other advantages, it seems fair to say that the choices of such individuals are more free with respect to the desired outcomes than the choices of individuals who are not so advantaged. This inequality is so closely connected to the inequalities Title VII was designed to address that it must be explicitly taken into account if the statute is to have any chance of achieving its goals.

In the context of cases in which the basis of the decision concerns assimilation (such as English-only rules or employer dress codes), I join previous commentators in contending that such discrimination does fall within the purview of Title VII and that the business necessity and Bonafide Occupational Qualification ("BFOQ") inquiries should be dispositive.[151] Even if in some cases it is a legitimate goal of the employer

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[150] Krieger, *supra* note 135, at 486.

[151] *See, e.g.*, Bartlett, *supra* note 37, at 2576–77; Bayer, *supra* note 21, at 772–73. Of course, the business necessity and BFOQ standards are inquiries unto themselves; to say "business necessity should be the standard" is not saying much.

or society in general to demand conformity to certain norms,[152] it is not legitimate for Title VII to be used retroactively to penalize employees who failed to conform. This is especially so because one ostensible goal of Title VII was meant to change some of the very norms that are being contested in these cases. Because we have no way of deciding in advance which of these norms are legitimate and which are impermissibly discriminatory, all claims that involve departure from the standards preferred by the employer should be interpreted in the light most favorable to the plaintiff. If compliance with the at-issue norms is truly legitimate (nondiscriminatory on a prohibited basis) and necessary to the employer, that fact will come out in the course of the litigation.

In cases in which assimilation is not directly at issue, voluntarist arguments are even more clearly objectionable. The problem with courts' acceptance of the lack of interest argument, for example, is that it fails to acknowledge the employer's power in shaping the supposedly "free" choices of applicants and the influence of the courts in giving effect to that power.[153] Even if the alleged preferences of minority and women employees for lower-paying, less rewarding work (itself a hard-to-swallow idea) were in part formed separately from and prior to the working world, however, that would still fail to exonerate the lack-of-interest argument because the relevant Title VII issue is not whether the employer intended to segregate the work force but whether the employer may engage in practices which perpetuate segregation.

Whether assimilation is at issue or not in a case, the use of voluntarism rhetoric functions in a similar way: to divert attention from the issue of

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For the record, the Civil Rights Act of 1991 dictates, a strict business necessity standard that requires an employer to show both that the practice or policy in question is related to a legitimate business interest *and* that it is job-related for the position in question. Similarly, BFOQ is a standard that was meant to be met only rarely.

[152] *See* Yoshino, *supra* note 22, at 505–06 (noting that "assimilation has positive as well as negative aspects" and arguing that the important inquiry is when and in what contexts encouraging or demanding assimilation is appropriate). This is rarely acceptable. In fact, of all the examples discussed in this Article, the only one that presents a possible case of a norm to which employers and society have a legitimate interest in seeing individuals conform is the context of arrest and conviction records. In other words, one might argue that we as a society want to encourage individuals to refrain from committing crimes. Even that claim is more ambiguous than it might first appear, however, because it requires an unquestioning acceptance of the notion of criminal conduct as it is currently constituted.

[153] *See* Schultz, *supra* note 30, at 1839–43.

discrimination so as to absolve the employer of any responsibility for it. Rather than focusing on the narrow and counterproductive question of moral blame, one might ask who is better able to address the problems of employment discrimination and job segregation in a particular workforce. Is it the employer or the individual worker? In most cases, the employer is in a better position to do so. It seems likely that Congress was aware of this and intended to acknowledge it by passing Title VII. The displacing of responsibility from the employer to the employee through the use of notions of individual choice serves only to impede the amelioration of these problems.

An expansive reading of Title VII suggests that the purpose of the statute was not simply to prohibit "discrimination" in employment against women, racial minorities, and religious minorities, but to dismantle the hierarchies that undergird such discrimination and promote true equality by transforming employment, a central site of identity formation for most Americans. Such a transformation would affect not just employment per se but indeed the entire social and economic infrastructure. The economic stratification of our society along race, gender, and other invidious lines (such as national origin) is, then, what Title VII must attack if it is to have any significant, lasting effect.

Thus, one of the major reasons to remain skeptical about the norms preferred by employers is that such norms privilege, in the employment context, those who are already privileged in other contexts in such a way as to implicate considerations far beyond the question of individual liberty. Rather, Title VII's promise is to reduce the extent to which some individuals are privileged above others in the employment context and to extend equal opportunities in employment to individuals regardless of their race, sex, national origin, or religion. In order for true equality of opportunity to become a reality, we must engage in a full-scale rethinking of many of the cultural norms that we now take for granted. We must also question whether conforming to such norms is really simply a matter of choice.

Professor Bayer, for example, correctly diagnoses the evil inherent in the way courts have differentiated between "mutable" and "immutable" traits but fails to question the mutable/immutable dichotomy itself. He does not disagree with the courts that speaking English in the workplace, for example, is a matter of choice;[154] instead, he argues that such conduct

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[154] *See* Bayer, *supra* note 21, at 774 ("To simply respond that a mutable characteristic is one that the individual may, by definition, easily change, wrongly presumes that there is little or no harm to the individual who is compelled either to make such a change or forego an employment opportunity. . . . [Employers] should not have the authority to compel a worker to make such a choice.").

should be protected under Title VII because it is closely related to a protected status and because it is constitutive of identity.[155] While his contentions are debatable, they do not provide a complete account of why the mutable/immutable distinction is critically flawed and should thus be abandoned.

When courts speak of immutable traits, they generally refer to traits that are both not amenable to change and that are biologically determined. Yet, as a number of commentators have pointed out in examining the immutability criteria in equal protection law, not all protected statuses are biologically determined,[156] and not all biologically determined statuses are protected.[157] Kenji Yoshino argues that the so-called mutable/immutable distinction would be more accurately characterized as a line drawn "between 'corporeal' and 'social' traits."[158] This reconceptualization of the distinction better captures the essence of the assumptions from which the courts appear to be drawing in deciding these cases. At the same time, it is important to recognize that the widespread assumption is that biology is to culture as immutable is to mutable and to avoid unquestioningly accepting this conflation as fact. Indeed, the opposite may be more accurate.

For example, Eve Sedgwick has argued that the historical conflation of nature/nurture and immutability/mutability "may be in the process of direct reversal," as "[i]ncreasingly it is the conjecture that a particular trait is genetically or biologically based, *not* that it is 'only cultural' that seems to trigger an estrus of manipulative fantasy in the technological institutions of the culture."[159] In other words, in an age in which Michael Jackson can

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[155] *See id.* at 839. Bayer states:

> The fact that behavior or custom may easily or not easily be altered provides few clues regarding the personal importance attached to such behavior or custom. Individuals define themselves, express their singular personalities, and conceive their special identities through a wide amalgam of acts, including choice of clothing, personal grooming, language, and other arguably mutable characteristics. If we recognize that individual dignity, personal freedom, and sense of self are often intimately tied to mutable characteristics, then we must criticize the cavalier fashion with which courts dismiss individuals' claims that employers' racially, sexually, or ethnically premised rules unjustly restrict personal integrity and expression.

Id.

[156] Religion is the most notable exception.

[157] For example, intelligence probably has a biological component but is unlikely to become a protected status. *See supra* notes 126–28 and accompanying text.

[158] Yoshino, *supra* note 22, at 495.

[159] Eve Kosofsky Sedgwick, *How to Bring Your Kids Up Gay: The War on Effeminate Boys*, *in* TENDENCIES 154, 163–64 (1993).

almost literally become white, sex-conversion surgery ensures that the sex of one's body is not fixed at birth, and as genetic engineering looms on the horizon, it seems clear that many biologically based traits are already, or are in the process of becoming, mutable. Might this renewed interest in tinkering with nature signify that we have come to the conclusion that, at least with respect to the individual, it is easier to change biology than culture? If the answer is yes, then the law must rethink its reliance on notions of voluntarism in deciding Title VII cases.

It is far from clear that requiring compliance with majoritarian norms or absolving employers from responsibility for their role in perpetuating the effects of societal discrimination is as simple or unproblematic a matter as courts seem to suggest. The actions of individuals are located within social and cultural matrices that limit or narrow the ostensibly infinite range of choices that each person perceives are available to them at any given time.[160] The use of voluntarist ideology to justify discriminatory outcomes functions in such a way as to freeze those cultural matrices in place and prevent individuals from moving outside them, frustrating the effectuation of the goals of Title VII.

The cultural matrices that limit the range of an individual's realistic choices are economic, racial, and gendered in nature, among many other factors. It is sometimes the case that the range of an individual's perceived choices represents a continuum whose endpoints might be perceived as "assimilative" and "non-assimilative" with respect to the norms of the dominant culture. For example, an African-American woman might choose to straighten her hair (the most assimilative choice), to wear it in braids (somewhere in the middle), or to wear it in dreadlocks or let it "go natural" (less assimilative choices). In other cases, an individual's choices, either as she perceives them or as they actually exist (itself a false dichotomy because the only choices that may in any meaningful sense be said to exist are those perceived by the individual) may not extend to both ends of the continuum, and the question of assimilation may be moot. But the crucial question is: assimilative with respect to what? In the context of Title VII, the answer is the preferences of employers, whose decisions have only been minimally limited by interpretations of Title VII. To privilege the choices of employers over the choices of employees in the context of Title VII

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[160] I first realized this during my first year of law school, as I walked by construction workers who were working on the renovation of the law school one bright fall morning. It occurred to me then that it was likely that attending Yale Law School was no more a realistic possibility for them than being a construction worker was for me. The idea for this Article was in some sense born that day.

claims is deeply problematic because the employers who make these decisions are the very individuals who are situated in a privileged position vis-à-vis one or more of the status hierarchies that Title VII should serve to help dismantle.

Specifically, what this means is that when the employer's conveniences and preferences are served by its employees' Sabbath falling on Sunday rather than Saturday, for example, the "choice" of the Christian employee to observe her Sabbath is facilitated and the "choice" of the Jewish or Seventh Day Adventist employee to observe her Sabbath is constrained. The Christian's freedom to choose is not equal to the Jews' because they are differently situated with respect to the non-neutral rule. Similarly, for all the *Rogers* court's protestations to the contrary, an employer preference that employees not wear their hair in braids is almost invariably going to affect only the "choices" of African-American women. Rogers' "choice" whether to wear her hair in braids was certainly less free than the choice of a white man not to wear *his* hair in braids.

When an employer argues that a sexual harassment victim chose to "ask for it" by dressing or talking in a way her harasser considered provocative, for example, or punishes the "choice" an employee makes to speak Spanish in the workplace or to undergo sex-conversion surgery, the employer is usually reflecting an "insider" perspective. Employers often perceive the existence of a different set of accessible choices for the recalcitrant employee than she perceives are meaningfully available to her. She is not as free to conform to the employer's demands as the employer believes she is. In many cases, by the time the argument about choice is made she no longer has the option to make the choices the employer, and the courts, would have preferred that she make. In these ways, appeals to voluntarism are often a means of punishing plaintiffs who not only do not, but perhaps in some meaningful way *cannot*, conform to dominant norms of acceptable behavior or appearance, regardless of the actual merits of their discrimination claims. In these cases, courts privilege the norms preferred by employers over the interests of the employee plaintiffs in such a way as to hinder the transformative project of employment discrimination law. Because employment serves not only as an important site of identity formation but also as an individual's very livelihood, employers already exercise tremendous power over workers. The prevailing interpretation of Title VII, with its emphasis on the individual choices of plaintiffs, ensures that this power will remain considerable.

In the context of the philosophical debate with which this Article begins, I would argue that determinism is mostly true, and free will mostly false. But I join Susan Wolf in arguing that acknowledging the inadequacy

of prevailing ideas about free will does not necessarily entail an abandonment of responsibility.[161] What it does entail is a rethinking of how we allocate responsibility and its attendant costs. Once we recognize that discrimination is not an act perpetrated by individuals, but a societal phenomenon that is sustained through institutions and institutional practices, the obvious solution to the problem is to encourage social change by changing institutions rather than punishing individuals. This is not an argument against assigning responsibility but about placing it upon the institutions that can bear it and for whom bearing it is likely to produce the consequences that we supposedly are striving for—a more equal society. So far, reliance on the ideology of voluntarism has facilitated an interpretation of Title VII that undermines the very purposes for which it was created and punishes those whom it was designed to help.

If a world in which all persons are presumptively equal and possess meaningful opportunities and choices about how to live their lives is a goal that is worth striving for, then the law must allocate the burdens of moving toward that world such that they fall more heavily on those who have more power, rather than on those who have less. If we are to begin to dismantle the status hierarchies that are crippling our democracy, voluntarism rhetoric must be exposed for what it is: a false ideology whose end is not to reward the virtuous, but to punish the already-disadvantaged.

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[161] *See* Wolf, *supra* note 17, at 101.